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IN THE

Supreme Court of the United States

October Term, 1965

No. 264

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

FRANK L. MARTIN, ODESSA MITCHELL and FLOYD HAZEL,

Defendants-Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

The petitioners, Frank L. Martin, Odessa Mitchell and Floyd Hazel, seek a review of a judgment of the New York State Court of Appeals affirming a conviction for Disorderly Conduct (*People* v. *Martin* [1965] 43 Misc. 355, aff'd. 15 N. Y. 2d 933).

The order of affirmance was dated March 18, 1965 and it affirmed, without opinion, a judgment of the Appellate Term of the Supreme Court of New York, Second Judicial Department.

The petitioners were charged with Disorderly Conduct in violation of § 722, subdivision 1 and 2 of the Penal Law

by information, it being alleged that on September 10, 1963, at 11:30 P.M., in the school auditorium of the Malverne Junior High School, Malverne, Nassau County, New York, the said defendants "with intent to provoke a breach of the peace and whereby a breach of the peace was occasioned, did use offensive, disorderly, abusive and insulting language, conduct and behavior, and did act in such a manner as to annoy, disturb, interfere with, obstruct and be offensive to others." More particularly, the information alleges that "at the time and place aforesaid, the said defendants remained and refused to leave, subsequent to a regular public meeting of the Board of Education held at the aforesaid place and which was officially adjourned at or about 9:30 P.M." Continuing, the information charges that Clement Wolff, the Assistant Superintendent of Schools for Business, Malverne Junior High School, Malverne, New York, "requested over a public address system that everyone leave the auditorium and all left except the defendants. Mr. Wolff again made two personal requests of the defendants to leave which were completely ingored. The said defendants congregated in the auditorium without permission where there were other school personnel present. Defendants remained until escorted out by the Malverne Police Department at 11:30 P.M."

The three defendants were tried before Judge Daly of the District Court without a jury. *The Judge*, at the end of the case, *dismissed* so much of *the charge* as alleges that the defendants used offensive, disorderly, threatening, abusive or insulting language as *outlawed by subdivision 1 of § 722.*

All three defendants were found guilty of violating subdivision 2 for having acted "in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others."

At the trial, the defendants were represented by Jawn A. Sandifer, Esq., and the People by William Cahn, District

Attorney of Nassau County (Martin Weinberg, Assistant District Attorney).

In the Appellate Term, the appellants were represented by the same counsel, whereas the People were represented by William Cahn, District Attorney of Nassau County (Martin I. Silberg, Assistant District Attorney).

In this Court, the appellants are represented by Robert L. Carter, Esq., Joan Franklin, Esq., Barbara A. Morris, Esq., and the People by William Cahn, District Attorney of Nassau County (Henry P. DeVine, Assistant District Attorney).

Jurisdiction

The jurisdiction of this Court flows from Title 28, § 1257(3) of the United States Code.

Constitutional Provision Involved

It is claimed on petitioners' behalf that the proceedings involved the Fourteenth Amendment to the United States Constitution.

New York Statutes Involved

§ 722. Disorderly Conduct.

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.

Introduction

The defendants resided in the Malverne School District and on the night of September 10, 1963, they attended a public meeting of the Board of Education held in one of the local public schools. The meeting was adjourned at 9:30 P. M., after which those in attendance departed. The defendants remained in what amounted to a "sit-in", it being conceded that their action was directly related to the efforts of a minority group to bring about the integration of the grammar schools in the Malverne School District.

The gist of the petition is § 722, subdivisions 1 and 2 of the New York Penal Law are unconstitutional on their face. Also, it is argued that the statutes as applied interfered unconstitutionally with petitioners' right to speak, assemble and petition within the meaning of the United States Constitution.

The respondent argues this Court has already concluded that § 722, subdivision 2 of the New York Penal Law is sufficiently definite and certain as to be constitutional (*Feiner* v. *New York*, 340 U. S. 315; *cf. Cox* v. *Louisiana*, 379 U. S. 536, pp. 589-590). Furthermore, subdivision 1 of § 722 is not before the Court because the count of the information set forth under this provision of law was dismissed by the Trial Judge.

Finally, it is contended that the petitioners' constitutional rights to speak, assemble, and petition were not interfered with unlawfully and so the petition should be in all respects denied. It is to these points that the brief shall be essentially devoted.

The People's Evidence

Clement Wolff (pp. 15-18) is the Assistant Superintendent of Schools in the Union Free District #12 in the Village of Malverne, Nassau County. He testified that at 8:30 in the evening of September 10, 1963, the Board of Education

held a regularly constituted public meeting in the auditorium of the Junior High School.

The meeting evidently proceeded in an orderly fashion when after approximately one hour, some turmoil arose and the President of the Board of Education formally adjourned the meeting at 9:30 P. M. At this point, the President requested everyone to leave and the entire Board left the stage. Assistant Superintendent Wolff went back into the auditorium some fifteen minutes later and noticed that very few people had left. He then announced over the microphone that everyone should leave so that he could secure the building.

At this point, he left the building but returned at approximately 10 o'clock. He still noted about twenty-five people remaining in the auditorium. Once again, he requested these people to leave and at this point everyone did so with the exception of the defendants (pp. 16, 17).

Wolff now approached the three defendants and again specifically directed that they leave. At this point, Wolff noted that they had a battery operated lantern with them in addition to food, drink, newspapers and magazines. After fifteen minutes when the defendants had not complied with his request, Wolff went to the Malverne Police Department where he signed a complaint charging the defendants with disorderly conduct (p. 17).

Robert Murphy (pp. 28-34) who is the custodian of the school in which the meeting was held completely corroborated the testimony of Assistant Superintendent Wolff.

William Caulin (pp. 34-38) is a patrolman assigned to the Malverne Police Department. He stated that as a result of Wolff's complaint, he arrived at the school and knocked on the door seeking admittance. The two male defendants, Martin and Hazel, came to the door and refused him admittance.

At this point, Custodian Murphy, in the company of the Police Chief, opened the door and the defendants were arrested.

At the conclusion of this testimony, the People rested.

The Defense

The sole witness for the defense was the appellant, Floyd Hazel. The gist of his testimony is that he "stayed there because first of all, to my knowledge the Board—the meeting was never adjourned and the question that I had for the School Board to answer was not a part of the agenda and I remained there hoping that I could see some members of the Board of Education in regard to this question." (p. 47) Continuing, Mr. Hazel testified that Mr. Wolff "came and asked members of our group to leave and the answers that Mr. Wolff received was that we would not remove ourselves until we had a chance to meet with the Board of Education." (p. 47)

POINT I

Guilt was established beyond a reasonable doubt.

Defendants contend when they refused to leave the school auditorium they did not act "in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others" within the meaning of § 722, and if they did, the circumstances were not such that it was reasonable to believe a breach of the peace might be occasioned as required by § 722. We disagree.

It is not denied that the school authorities are charged with the care of the school buildings and as such, they are possessed of the authority to promulgate reasonable rules and regulations. Unquestionably, the meeting was legally concluded by the Board of Education and it remains one of

the mysteries of this case why the appellants believed they had a legal right to camp in the school auditorium for the night without annoying, disturbing or interfering with the school officials whose job it is to secure the school.

The school authorities, of course, testified they were concerned, as well as annoyed and disturbed by the defendants' continued presence in the school because of the possible dangers resulting therefrom.

It is clear that the school people might have locked the building with the defendants inside and gone home. In the alternative, the building might have been left unlocked. In either event, this would have resulted in a danger to the school property and possibly even to the defendants themselves.

The third possibility open to the school officials was to take the law into their own hands and forcibly eject the defendants from the premises before securing the same, all of which obviously could have led to a breach of the peace.

Mr. Wolff did the only thing a responsible school official could do—he sought recourse to the law provided for by the Legislature of this State. He filed a complaint at the Police Headquarters in the Village of Malverne and it was the police who removed the defendants, albeit peaceably, from the premises.[1]

Everybody is agreed that the defendants' conduct was in connection with a dispute with the local school officials over the placement of children in the various Malverne schools in relation to the overall problem of segregation. This Court must know that similar disputes in New York and elsewhere in the country have led to a breach of the

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[1] § 722-b outlaws loitering in a school building by any person not the parent or legal guardian of a pupil. It was understood that some or all of the defendants had children in attendance in the Malverne school system so § 722-b was not employed.

peace and the situation could have been repeated in Malverne.

There is no question regarding the defendants' intentions. *The conceded facts are they came to the meeting armed with a lantern, drinks, magazines and newspapers, as well as a blanket, so they were prepared for a siege.*

It is respectfully submitted the defendants under the circumstances of this case had no right, constitutional or otherwise, to remain in the school building after the meeting was adjourned.

Defendants have attempted to bring themselves within the scope of *Edwards* v. *South Carolina*, 372 U. S. 229 which, of course, is readily distinguishable on the facts. In *Edwards* the defendants were protesting a grievance and *they were where they had a legal right to be*, to wit: in the public street expressing their grievances. The defendants' conviction arose out of their refusal to disperse from the public thoroughfare at the direction of the police.

The *Edwards* case was reversed by the Supreme Court because the defendants had a legal right to assemble in a public place and to express their grievance in a state which is *de jure* and *de facto* hostile to the rights of negroes. There is no claim, and there is certainly no evidence that the situation attending Edwards in South Carolina existed in Malverne in relation to Frank L. Martin, Odessa Mitchell and Floyd H. Hazel. The right to be in the street (*Edwards* v. *South Carolina, supra; cf. People* v. *Grant*, 306 N. Y. 258; *People* v. *Diaz*, 4 N. Y. 2d 469) does not include the authority to bivouac in a school auditorium in Malverne, Long Island (*cf. Ellis* v. *Dixon*, 349 U. S. 458, rehear. den., 350 U. S. 855; *Ellis* v. *Allen*, 4 App. Div. 2d 343, app. den. 4 N. Y. 2d 693; Sec. 414 Education Law). The defendants were disorderly so the judgment on this score should not be disturbed.

As Regards Defendants' Intentions

Unquestionably, a defendant has a right to testify to his intentions (*People* v. *Levan*, 295 N. Y. 26) and Hazel, the only defendant to testify, did just that. His testimony was that he "stayed there because first of all to my knowledge the Board—the meeting was never adjourned and the question that I had for the School Board to answer was not a part of the agenda and I remained there hoping that I could see some members of the Board of Education in regard to this question." Hazel also testified that Mr. Wolff "came and asked members of our group to leave and the answers that Mr. Wolff received was that we would not remove ourselves until we had a chance to meet with the Board of Education."

Of course, the meeting had been adjourned and the Board of Education, as well as everyone else had long since departed for their homes so it was clear that there were no members of the Board of Education any longer present in the school to discuss the school problem. Over and above this fact, however, we must remember that the appellants had equipped themselves with a light, blanket, drinks and reading material, so the irresistible inference is that the defendants had planned to stay overnight to bring attention to what they considered to be a grievance.

There was no secret about this case or the circumstances surrounding it. Everybody was agreed that the defendants were protesting the school conditions in Malverne and the trial proceeded in this vein.

There was no need, in New York at least, to resort to disorderliness to advocate a cause in connection with school integration. The Commissioner of Education in the State of New York has promulgated rules and regulations to bring about the integration of the schools in this jurisdiction and the New York State Court of Appeals in a case out of Malverne, Long Island paralleling this criminal proceeding

concluded that they would not disturb the judgment of the Commissioner of Education (*Matter of Vetre v. Allen* [1965] 15 N. Y. 2d 259). As a matter of fact, the *Matter of Vetre* v. *Allen, supra,* is currently before this Court in the form of a petition and is, we believe, Case No. 246, October Term 1965 of this tribunal.

It is clear, therefore, that the defendants have proper legal remedies on the civil side of the law in the State of New York to implement the decisions of this Court relative to school integration. There is no need to resort to disorderliness and otherwise "annoy, disturb, interfere with, obstruct, or be offensive to others" who are charged with the responsibility for a fine, modern, up-to-date public school in Malverne, Long Island, New York. The school authorities were only doing their job and what they did in no way interfered with the petitioners' Federal constitutional rights.

So far, this Court has not concluded that any private citizen has a right to convert the auditorium in a public school into his own private domitory and we hope they never do.

POINT II

Section 722, subdivision 2 is constitutional.

The argument is Section 722, subdivisions 1 and 2 are so indefinite and uncertain that they do not fairly circumscribe the prohibited conduct.

As for Subdivision 1

The petitioners argue that subdivision 1 is unconstitutional. As a matter of fact, it is clear from the record that Judge Daly, the Trial Judge, at the end of the case dismissed the count of the information charging a violation of subdivision 1 of Section 722 and so it is respectfully submitted this statutory provision is not properly before the Court.

With Regard to Subdivision 2

There is nothing new about § 722, subdivision 2 of the New York Penal Law insofar as this Court is concerned. As a matter of fact, it specifically appears that this Court has concluded that § 722, subdivision 2 is sufficiently definite and certain to meet the minimum requirements of due process (*Feiner* v. *New York*, 340 U. S. 315; cf. *Cox* v. *Louisiana*, 379 U. S. 536, pp. 589-590).

For the reason that this Court has already concluded that the statute is constitutional and there are no good reasons to re-examine the prior decision of this Court or anything suggesting that the prior determinations are improper, it is most respectfully submitted the petition in this regard should be denied.

POINT III

Section 722, subdivision 2 as applied not unconstitutional.

The petitioners argue that the People did not make out a *prima facie* case and the conclusion of the New York State Court of Appeals to the contrary necessarily prevented the petitioners from their constitutional right to speak, assemble or petition. Clearly, this is not so.

The key point in the case will be found in the fact that the defendants were reposing in the public school building long after the meeting had been adjourned and the School Board had left for home. It must be admitted that there was no one in the building to speak to or submit any petition to and no one else to assemble to discuss the school situation in Malverne.

It is argued that the statute as applied is unconstitutional because there was no clear and present danger that a breach of peace might occur.

Whether this is true or not, it is most respectfully submitted the clear and present danger test applies to acts and declarations in a public place. Unquestionably, if the petitioners had been peacefully picketing on the sidewalk before the school they could have continued to do so for the entire night without interference (*Kunz* v. *New York*, 340 U. S. 290; cf. *Edwards* v. *South Carolina*, 372 U. S. 229). Where however, the defendants are not on a public thoroughfare, but in a court house or a school building which must be closed for the evening, the clear and present danger test would have no application.

We are not aware of any precedent anywhere justifying the conduct of these petitioners and certainly, none of the cases cited in this connection by the petitioners are even close on the facts.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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